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Supreme Court of the United States

October Term, 1959

No. 938

CHILEAN NITRATE AND IODINE SALES CORPORATION,

Petitioner,

against

AMICIZIA SOCIETA NAVEGAZIONE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Appendix (Opinion of Court of Appeals)

Supreme Court of the United States

October Term, 1959

No.

CHILEAN NITRATE AND IODINE SALES CORPORATION,
Petitioner,

v.

AMICIZIA SOCIETA NAVEGAZIONE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Chilean Nitrate and Iodine Sales Corporation prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above cause on February 16, 1960.

For the sake of clarification the parties will be referred to according to their commercial status: The present petitioner as Charterer and the respondent as Owner.

Opinions Below

The opinion of the Court of Appeals (Clark, C. J.) is reported at 274 F. 2d 805 and also appears in the appendix to this petition.

The opinion of the District Court (Cashin, J.) is not reported but is printed at 50a-54a.*

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* Citations to pages of the Appendix to Charterer's brief in the Court of Appeals are to numbers suffixed with the letter "a." Citations to the record in the District Court are to numbers prefixed with the letter "R."

Jurisdiction

The judgment of the Court of Appeals was entered on February 16, 1960 (Appendix, p. 1). The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

Questions Presented for Review

1. When the validity of a contract containing an arbitration clause is challenged for want of a meeting of the minds, is the dispute within the province of arbitration, and not of a United States court otherwise having jurisdiction, if the challenge is not directed at the arbitration clause itself?

2. May a party assert a right of arbitration for the first time in an appellate court after having acquiesced in a judicial determination on the merits in the trial court so as to deprive the opposing party of a determination on the merits either by arbitration or judicial procedures?

3. Is the right of judicial review over arbitration awards for "manifest mistake"[1] or "manifest disregard"[2] of law not applicable to cases involving the construction of contracts?

Statutes Involved

9 U. S. C. § 2. A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U. S. C. § 10(d). [The United States court may vacate an award] where the arbitrators exceeded their powers . . .

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[1] *United States* v. *Farragut*, 20 Wall. 406, 420.

[2] *Wilko* v. *Swan*, 346 U. S. 427, 436.

The Case

Owner is an Italian shipowner with its head office in Genoa, Italy and is dominated by the Parodi family (33a-34a).

Charterer is a Chilean distributor of nitrate with its head office in Santiago, Chile (25a).

As of September 6, 1955, the parties entered into two charters for ships then under construction and eventually delivered in December, 1956 (SS GIORGIO PARODI) and August, 1957 (SS DONATELLA PARODI) (9a-10a, 16a, 17a). The charter hire was at the rate of approximately $1,500 per day per ship. The charters were to run for five years after delivery of the respective ships (9a-10a).

The controversy over "double-rigged". The controversy concerns the rigging of the hatches. In recent years a set of rigging involves two booms, one fixed, or "spotted", over the hold; the other, over the dock. One gang of stevedores works one set of rigging. With increasing frequency ships are being rigged at the larger hatches with two sets of rigging per hatch, each set with two booms, or a total of four booms (and corresponding winches) per hatch.

With two gangs of stevedores working at a hatch, cargo can be loaded and discharged twice as quickly and the time of the in port turn-around thereby sharply reduced. Because of the longer time necessary for stevedoring with only a single set of rigging, as compared with two, Charterer at the arbitration showed damages already then incurred of $101,583 and anticipated future damages to the end of the charters of an additional $346,391, a total of $447,975 (R. 454).

The only factual dispute in this arbitration and litigation has been whether the expression "double-rigged" meant in New York two sets of rigging, each with two winches and two booms, or a single set of rigging with two winches and two booms.

The majority arbitrators have held that both meanings are current in New York and for present purposes Charterer accepts that finding (18a).

On unchallenged facts, Charterer used the expression "double-rigged" to mean four winches and four booms and Owner had reason to know it. The charters were offered to Charterer by Owner's New York agent, Mr. C. P. Lambert of J. H. Winchester & Co., who wrote a letter proposing specific terms (36a). At the same time Mr. Lambert sent two plans of the ships to Charterer's New York agent, Mr. J. H. Graves (25a, 34a). Both these plans showed only two winches and two booms at each hatch (34a).

On instructions from the head office in Santiago, Charterer's New York agent made to Owner's New York agent a counteroffer of several demands of which one was that hatches 2, 3 and 5 should be "double-rigged" (25a-26a).

Owner's New York agent, who did not testify although he was in the hearing room, then sent Owner in Genoa a cable saying that Charterer (34a):

> "ACCEPT YOUR OFFER WITH FOLLOWING ALTERATIONS . . . HATCHES 2/3/5 DOUBLE RIGGING".

On cross-examination Owner's Marine Superintendent, who was in charge of the negotiations for Owner, testified (35a):

> "Q. Well, it was a counter-proposition? A. Yes.
>
> "Q. Therefore, it was the respects in which they were willing to make an agreement different from what you had proposed to them, isn't that what it means? A. Yes.
>
> "Q. One of the alterations, one of the features of the counter-proposition was 'Hatches 2/3/5 double rigging'. A. Yes.
>
> "Q. Therefore, you knew they wanted something different with respect to hatches 2, 3 and 5, did you not? A. Perhaps I pay no attention to that but I am sure double rigging means two winches, two derricks."

The counter demand that these hatches be "double-rigged" was accepted by Owner and embodied in the fixing note and charters (14a).

When the ships were built they proved to have only one set of rigging at each hatch, that is, did not have double-rigging in the sense in which Charterer had used the term (14a).

The arbitration. Charterer demanded damages. The charters had arbitration clauses and the dispute went to arbitration. The issue submitted to arbitration was whether "under the subject charter party" the hatch equipment satisfied the "double-rigged" provision (14a).

A majority of the arbitrators decided in favor of Owner because "the expression was proposed and inserted in the charter party at the request of charterer" (18a).

The majority also noted that

> "It would appear both the owner and charterer took for granted their individual opinion as to the requirement dealing with the number of winches and booms at a hatch and no attempt was made by either party to further clarify their understanding." (17a)

One arbitrator dissented on the ground that Owner necessarily knew, or had reason to know from the course of the negotiations, that Charterer wanted four winches and four booms at each hatch (20a-21a).

The Court proceedings. After Charterer had served a notice of motion in the state court to vacate the award, Owner commenced this proceeding in the United States District Court to confirm the award (50a).

Charterer cross-moved to vacate the award (50a).

a. The basis of this cross-motion was that the award embodied a "manifest mistake" of law and a "manifest disregard" of law. The principle of law disregarded was that contract language will be construed as the promisor

had reason to know that the promisee understood it. The Second Circuit Court of Appeals has repeatedly and emphatically asserted this principle, saying for instance in *Ryan* v. *Ohmer*, 244 F. 31, 34, that contract language "*must be interpreted* in the sense in which the promisor knew, or had reason to know, that the promisee had understood it." To the same effect are *Gates* v. *Megarel*, 266 F. 811, 818 (C. A. 2d); *C. H. Pope & Co.* v. *Bibb Mfg. Co.*, 290 F. 581, 583, 586, 587 (S. D. N. Y. and C. A. 2d); *Sun Oil Co.* v. *Dalzell Towing Co.*, 55 F. 2d 63, 64-65 (C. A. 2d); also *U. S. Rubber Co.* v. *Silverstein*, 229 N. Y. 168, 171; *O'Neil Supply Co.* v. *Petroleum Heat & Power Co.*, 280 N. Y. 50, 55; 3 Corbin, *Contracts*, §§ 537, 543; 3 Williston, *Contracts* (Rev. Ed.), §§ 603, 605.

b. Further, and as an alternative, Charterer resisted confirmation on the ground that there had not been a meeting of the minds and hence there was no contract. This contention was largely based on the majority arbitrators' findings, cf. *supra*, p. 5.

When these cross-motions were argued on April 23, 1959 the law apparently was and had long been that the validity of a contract challenged for want of a meeting of the minds was, despite the presence of an arbitration clause, a matter exclusively for judicial determination, *Kulukundis SS. Co.* v. *Amtorg Trading Corp.*, 126 F. 2d 978 (C. A. 2d), a challenge properly asserted in opposition to a motion to confirm, *Finsilver, Still & Moss, Inc.* v. *Goldberg Maas & Co.*, 253 N. Y. 382, 391-392. Cf. *infra* p. 8.

In support of this position Charterer submitted to the Court the minutes and exhibits of the arbitration. Charterer requested the Court to determine this issue.

Owner in no respect opposed Charterer's request that the Court determine this issue of the validity of the contract.

The decision of the District Court. The District Court confirmed the award. The Court considered the issue of the validity of the contract on the merits, but upheld Owner, not on the ground that there had been a meeting of the minds, but on the ground that Charterer had not complained with sufficient promptness. The District Court's opinion was announced on June 22, 1959 (54a).

The Decision of the Court of Appeals

1. The Court of Appeals found "much to persuade in the arguments advanced by the dissenting arbitrator" (that Owner was put on notice of the sense in which Charterer had used the expression "double-rigged"), but held that it could not grant relief because the "misapplication * * * (of) rules of contract interpretation does not rise to the stature of a 'manifest disregard' of the law." Appendix, pp. 4, 5.

2. The Court further held that its decision in *Robert Lawrence Co.* v. *Devonshire Fabrics, Inc.*, 271 F. 2d 402, announced on October 28, 1959, was "dispositive" of Charterer's demand that the courts had jurisdiction to declare the contract invalid for want of a meeting of the minds. As the claim was not based on a misunderstanding of the arbitration clause, the dispute was "within the province of arbitration." Appendix, p. 6.

On this ground the Court refused to consider the meeting of the minds issue. Appendix, p. 6.

Reasons for Granting the Writ

1. This Court on March 7, 1960 granted a writ of certiorari to review the decision of the Court below in *Robert Lawrence Co.* v. *Devonshire Fabrics, Inc.*, 271 F. 2d 402, and now No. 659 on the present docket of this Court, the decision held by the Court below "dispositive" of the present case.

Charterer further submits that, although premised on *Robert Lawrence*, the decision in this case considerably extends its doctrine.

(a) The Court below refused judicial consideration on the ground that the meeting of the minds dispute was "within the province of arbitration", citing *Robert Lawrence*, although in the District Court Owner made no objection to judicial determination of this issue.

Presumably Owner did not do so because it thought *Kulukundis* and *Finsilver** stated the law, but whatever the reason, it did not object.

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* In *Kulukundis* the Court below held that an arbitration clause substantially the same as that involved here was not "sufficiently broad to include *a controversy as to whether the minds of the parties had ever met concerning the making of the very contract* which embodies the arbitration clause." 126 F. 2d 986.

The Court further held in *Kulukundis* that even if an arbitration clause were so drawn, it "would not be within the Arbitration Act." 126 F. 2d 986.

Although the Court below in its present opinion distinguishes *Kulukundis* on the ground that the authority of an agent was in issue, the *Kulukundis* opinion in no way restricted its reasoning or its holding to that or any particular type of dispute as to a meeting of the minds. The contrariety of view can readily be seen by comparing 126 F. 2d 986-988 with 271 F. 2d 409-411.

In *Finsilver*, involving a claim for lack of meeting of the minds as to the subject matter of the contract, as distinguished from the arbitration clause, a unanimous court in an opinion by Chief Judge Cardozo held that the validity of a contract containing an arbitration clause was a matter for exclusively judicial determination.

> "Till there is an adjudication of its validity by a competent judicial officer, as for example upon a motion after due notice to confirm or vacate it, the issue of jurisdiction is open at the instance and for the benefit of any person aggrieved." 253 N. Y. 391-392.

There are many other decisions to the same effect. The law on the subject is perhaps most fully reviewed in *Loring & Evans v. Blick*, 33 Cal. 2d 603, discussing cases from many states.

Numerous decisions hold that a failure, until the eve of trial, to assert an arbitration clause in the contract on which suit is brought, constitutes a waiver of arbitration rights and permits the suit to proceed to judicial determination. *American Locomotive Co.* v. *Gyro Process Co.*, 185 F. 2d 316 (C. A. 6th) and other cases cited at Note 35 of the annotations to 9 U. S. C. § 3 in U. S. C. A.

We are aware of no case permitting a right to arbitration to be asserted for the first time in an appellate court.

What happened was that while the appeal was pending, indeed, after Charterer had filed its brief, the Court below decided *Robert Lawrence*. Owner thereupon proceeded to argue in its Court of Appeals brief that "In the Federal Courts, there are no longer avenues open whereby a Court will determine whether a contract as a whole was validly entered into * * *" (p. 17). We submit that one such avenue, still open even if *Robert Lawrence* is correct, is a failure to object in the trial court to judicial determination.

(b) The effect of the decision below is to deny Charterer, as to the meeting of the minds issue, either a judicial determination (in an appellate court) or a determination by arbitrators. In *Robert Lawrence* the Court only went so far as to hold that the fraud issue should be determined by arbitrators. It therefore directed the issuance of a stay pending arbitration; it did not grant judgment.

(c) The Court below held that "in addition" the parties' statement of the issues to the arbitrators, because referring to Clause 17, the arbitration clause, so broadened the clause so as to include the meeting of the minds dispute. Appendix, p. 6.

The issues, as stated and agreed to by the parties, were strictly confined to enforcement of the expression "double-rigged" (14a).

The ruling that a statement of issues of a particular dispute concededly within an arbitration clause expands the coverage of that clause so as to include another dispute not within the stated issues and not otherwise within the terms of the arbitration clause, is, we believe, unprecedented. Certainly the ruling is not supported by the quotation from *Finsilver*.

With great respect it seems to Charterer that the Court below has applied the *Robert Lawrence* doctrine without full appreciation of the particular circumstances of the case.

In this instance Charterer attempted to secure a judicial determination of the meeting of the minds issue because *Kulukundis* and *Finsilver* were apparently law. If the teaching of this case had then been available Charterer would have raised the question with the arbitrators, either originally, as an alternative, or after they made their findings. Presumably for the same reason Owner did not in the District Court challenge the jurisdiction of the courts.

Now the Court below has denied Charterer both judicial and arbitration procedures as to this issue.

2. The Court below has, Charterer submits, failed to apply the doctrine of this Court that judicial review extends to "manifest mistake" and "manifest disregard" of law. As applied to contract construction cases this failure brings the decision below into sharp conflict with the New York decisions, a most unfortunate situation in this great commercial and maritime state.

Charterer is aware that in arbitration cases a United States Court of Appeals must accord greater deference to the legal determinations of three business men picked more or less at random than it does in ordinary cases to those of a

United States judge, *ex hypothesi* a lawyer appointed to that high position because a President of the United States "reposed" "special trust and confidence" in his "Wisdom, Uprightness and Learning".

Charterer submits however that there are limits to that deference and that the decision below goes beyond those limits.

In the fairly recent case of *Wilko* v. *Swan*, 346 U. S. 427, this Court at p. 437 enjoined the reader to "note the right of review" over arbitration awards defined in "*United States* v. *Farragut*, 22 Wall. 406, 419-421." In *Farragut*, a decisional law case, this Court said at p. 420 and again at p. 421 that an award would be set aside for "manifest mistake of law." And in *Wilko* this Court said in substance at p. 436 that an award would be set aside for "manifest disregard" of law as exceeding the powers of arbitrators under § 10(d).

The doctrine of this case that misapplication of rules of "contract interpretation does not rise to the stature of a 'manifest disregard' of law" expresses a limitation not stated in *Farragut* or *Wilko* and is contrary to the attitude of the New York courts. Those courts have consistently set aside contract construction awards for clear error: *Matter of Stange*, 261 N. Y. 37 (arbitrators erroneously based award on *quantum meruit* rather than on contract price); *Matter of Western Union Telegraph Co.*, 299 N. Y. 177, 185 (award set aside because arbitrators used "extrinsic means" to construe contract;* "we know of no case where a court, in construing a contract obligation expressed in language as clear as is the clause here in controversy, has found it necessary to employ extrinsic means to ascertain a party's obligation thereunder"); *Matter of Heymanson*, 276 App. Div. 837 (1st Dept.)

* Because exceeding the powers of the arbitrators under the New York Statute from which § 10(d) was drawn (Civil Practice Act, § 1462, subd. 4).

("under the contract there was no correct way of reaching [the arbitrators'] conclusion"); *In the Matter of Drug Store Employees Union*, 255 App. Div. 870 (2d Dept.) (contract interpretation award set aside for "error of law"); *Modernage Furniture Corp.* v. *Weitz*, 64 N. Y. S. 2d 467 (Sp. T. N. Y. Cty.) (award reversed for failure to "reach only legal conclusion possible" on facts).

This difference in view causes races for jurisdiction such as occurred in this case. After Charterer brought suit in the State Court to take advantage of the New York rule, Owner forthwith dashed into the Federal Court with this proceeding (50a). Certainly in this great commercial and maritime center there should be uniformity if that is possible.

3. The Court below is, we believe, carrying judicial restraint in arbitration to such an extreme that the usefulness of arbitration is being impaired.

The Second Circuit Court of Appeals appears to Charterer to be in revulsion from what it conceives to be the errors, if not the sins, of judges of former times—"one of the dark chapters in legal history concerns the validity, interpretation and enforceability of arbitration agreements," the Court said in *Robert Lawrence* at 271 F. 2d 406.

The Court in *Robert Lawrence* expressly refused to follow a whole series of New York cases upholding judicial determination of issues of fraud, 271 F. 2d 412, and in this case the Court failed to follow both the *Finsilver* doctrine and the New York contract construction cases as to judicial power in arbitration.

This judicial abdication comes at a time when at least in the maritime industry there is increasing dissatisfaction with the erratic and unpredictable nature of arbitration awards.

In recent unpublished testimony to the House Judiciary Committee on H. R. 6322, which would substantially amend the Arbitration Act, a representative of the Maritime Law Association said:

> "By hypothesis and definition in such cases the arbitrators are not qualified to decide questions of law * * *. As a result, conflicting interpretations and applications of identical contract provisions occur, statutory rights and obligations are sometimes ignored and disputes have multiplied * * *. This confusion is necessarily accentuated because in arbitrations there is no continuity of personnel or traditions as in the courts."

The position of the Maritime Law Association then taken was endorsed without reservation by the American Merchant Marine Institute whose members own about 70% of United States flag tonnage.

The fact is that although businessmen like to avoid litigation, they are finding the unpredictability of uncontrolled arbitration even worse.

Events have thus borne out the scepticism expressed by the Court below almost twenty years ago in *Kulukundis*, 126 F. 2d 487:

> "We doubt whether [arbitration] will cure corns or bring general beatitude. Few panaceas work as well as advertised."

Arbitration can be a good method of settling disputes, especially where matters of industry practice are concerned. But it works best under a certain measure of judicial power. The relinquishment of that power impairs the usefulness of arbitration and creates a conflict between the state and federal courts.

At least twice in recent years this Court has had occasion to reverse decisions of the Court below limiting court jurisdiction in favor of arbitration. *Wilko* v. *Swan* and *Bernhardt* v. *Polygraphic Co.*, 350 U. S. 198.

It is often said that the law should have a capacity for growth. The difficulties which the maritime industry is now experiencing with arbitration suggest that at present growth is in the direction of judicial control, and certainly not in lessening it.

CONCLUSION

The Court should grant a writ of certiorari to review the decision of the United States Circuit Court of Appeals for the Second Circuit herein.

Further, Charterer respectfully asks that this case be set for hearing with *Robert Lawrence*. To do so would enable this Court to deal with related facets of that important doctrine in a single opinion.

Respectfully submitted,

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May 14, 1960.

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 150—October Term, 1959

(Argued January 14, 1960. Decided February 16, 1960)

Docket No. 25847

AMICIZIA SOCIETA NAVEGAZIONE,

Petitioner-Appellee,

—v.—

CHILEAN NITRATE AND IODINE SALES CORPORATION,

Respondent-Appellant.

Before:

CLARK, HINCKS and WATERMAN,

Circuit Judges.

Appeal from the United States District Court for the Southern District of New York, John M. Cashin, *Judge*.

Respondent, Chilean Nitrate and Iodine Sales Corporation, appeals from an order granting the petition of Amicizia Societa Navegazione to confirm an arbitration award involving charter parties of petitioner's vessels and denying respondent's motion to vacate or modify. Affirmed.

C. DICKERMAN WILLIAMS, of Maclay, Morgan & Williams, New York City, *for respondent-appellant.*

JOHN R. SHENEMAN, of Zock, Petrie, Sheneman & Reid, New York City (Anthony N. Zock and Francis J. O'Brien, of Zock, Petrie, Sheneman & Reid, New York City, on the brief), *for petitioner-appellee.*

CLARK, *Circuit Judge*:

This proceeding was instituted by petitioner's motion under 9 U. S. C. § 9 to confirm an arbitration award. Respondent filed a cross-motion under 9 U. S. C. §§ 10, 11, to vacate, modify, and correct the award. The court below granted the motion to confirm and denied the cross-motion, and respondent appeals.

On September 6, 1955, petitioner, as owner, and respondent, as charterer, executed two time-charter parties for vessels then under construction. The vessels were respectively delivered on December 27, 1956, and August 31, 1957, and currently remain in respondent's service under a five-year term. The dispute involves the vessels' rigging, *i.e.*, booms and winches. Clause 29 of each charter party provided that hatches 2, 3, and 5 were to be "double-rigged". But at respondent's insistence the parties adopted Addendum No. 1, which provided that all six holds of each vessel were to be "double-rigged". The vessels were in fact equipped with two winches and two booms at each hold, which petitioner asserts constitute "double-rigging". Respondent's position is that the expression "double-rigged" means four winches and four booms at each hold.

Clause 17 of the charter parties is a provision for unrestricted arbitration thus:

> "That should any dispute arise between Owners and the Charterers, the matter in dispute shall be referred to three persons at New York, one to be appointed by each of the parties hereto, and the third by the two so chosen; their decision or that of any two of

them, shall be final, and for the purpose of enforcing any award, this agreement may be made a rule of the Court. The Arbitrators shall be commercial men."

Pursuant to this clause, the parties submitted the following question to arbitration: "Under the subject charter party, does hatch equipment, consisting of two winches and two booms, satisfy the charter party term that the hatch be 'double-rigged'?" If answered in the negative, damages were to be assessed by the arbitrators.

The arbitrators, by a vote of two to one, ruled in favor of petitioner. Relevant portions of the majority opinion read as follows:

> "Based on testimony and the documents offered in evidence, it would appear both the owner and the charterer took for granted their individual opinion as to the requirement dealing with the number of winches and booms at a hatch and no attempt was made by either party to further clarify their understanding.
>
> • • •
>
> "It is the opinion of [the majority that] the expression 'double-rigged' has two meanings in New York, which is obvious from the evidence presented.
>
> "The facts indicate this expression was proposed and inserted in the charter party at the request of the charterer.
>
> "Therefore, under the circumstances, we find in favor of the owner in Item #1 of the agreement covering the submission to arbitration and no damages are awarded to the charterer."

The dissenting opinion relied upon the course of negotiations between the parties in concluding that petitioner understood "double-rigged" to mean four winches and four booms. Petitioner had forwarded plans of a vessel showing two winches and two booms at each hatch, but respondent had excepted in a counteroffer which specified that holds 2, 3, and 5 be "double-rigged".

Were we empowered to view the matter *de novo*, we would find much to persuade in the arguments advanced by the dissenting arbitrator. But as respondent recognizes, the court's function in confirming or vacating an arbitration award is severely limited. If it were otherwise, the ostensible purpose for resort to arbitration, *i.e.*, avoidance of litigation, would be frustrated. See Note, *Judicial Review of Arbitration Awards on the Merits*, 63 Harv. L. Rev. 681 (1950). The statutory provisions, 9 U. S. C. §§ 10, 11, in expressly stating certain grounds for either vacating an award or modifying or correcting it, do not authorize its setting aside on the grounds of erroneous finding of fact or of misinterpretation of law. It is true that an award may be vacated where the arbitrators have "exceeded their powers". 9 U. S. C. § 10(d). Apparently relying upon this phrase, the Supreme Court in *Wilko* v. *Swan*, 346 U. S. 427, 436-437, suggested that an award may be vacated if in "manifest disregard" of the law. But cf. *Bernhardt* v. *Polygraphic Co. of America*, 350 U. S. 198, 203 n. 4: "Whether the arbitrators misconstrued a contract is not open to judicial review," citing *The Hartbridge*, 2 Cir., 62 F. 2d 72, certiorari denied *Munson Steamship Line* v. *North of England Steamship Co.*, 288 U. S. 601. See also *Krauss Bros. Lumber Co.* v. *Louis Bossert & Sons*, 2 Cir., 62 F. 2d 1004; *James Richardson & Sons* v. *W. E. Hedger Transp. Corp.*, 2 Cir., 98 F. 2d 55, certiorari denied *W. E. Hedger Transp. Corp.* v. *James Richardson & Sons*, 305 U. S. 657.

Respondent contends that the arbitrators' reliance upon the principle that ambiguous language is to be construed against the author constitutes a "manifest disregard" of the law, since petitioner had reason to know the meaning respondent gave to the expression "double-rigged". But if labels are to be applied to the issues involved, we deem the question of what each party had reason to know to be one of fact. Further, an examination of the arbitrators' opinion has not disclosed to us any finding as to what the parties had reason to know, as opposed to what they did in

fact understand. While the evidence perhaps does suggest that petitioner had notice of respondent's meaning, the arbitrators may have been of the view that respondent, which proposed the term, had reason to know of the ambiguity. Or, as appears quite likely, the issue may not have been considered. But in any event, the misapplication—if it be that—of such rules of contract interpretation does not rise to the stature of a "manifest disregard" of law.

As an alternative defense, respondent contends that the charter parties are void for want of a meeting of the minds as to the meaning of "double-rigged", under the doctrine of the well-known case, *Raffles* v. *Wichelhaus*, 2 H. & C. 906, 159 Eng. Rep. 375 (Ex. 1864). Although this contention was not raised during arbitration, it is asserted that an issue as to the existence of a contract is one for *de novo* determination by the court. Reliance is placed upon the opinion of Chief Judge Cardozo in *Finsilver, Still & Moss, Inc.* v. *Goldberg, Maas & Co.*, 253 N. Y. 382, 391, 171 N. E. 579, 582, and the rationale that "[i]n the absence of a contract expressing a consent to arbitrate, an award by an arbitrator is an act of usurpation."

The recent decision by this court in *Robert Lawrence Co.* v. *Devonshire Fabrics, Inc.*, 2 Cir., 271 F. 2d 402, is, however, dispositive of the issue herein raised. There it was claimed that a purchase agreement containing an arbitration clause had been fraudulently induced. This court construed the Arbitration Act as envisaging the arbitration clause as a separable part of the contract and concluded that the alleged fraud had not affected the arbitration provision. It ws further determined that the arbitration clause was broad enough to encompass a charge of fraud in the inducement. *Kalukundis Shipping Co., S/A* v. *Amtorg Trading Corp.*, 2 Cir., 126 F. 2d 978, was distinguished as involving a question of an agent's authority to contract. If the agent had no authority to execute the charter party, it likewise had no authority to bind its alleged principal to the arbitration clause. But in the pres-

ent case there is no contention of lack of a meeting of the minds in respect to the arbitration clause. Since this clause is separable and provides for unrestricted submission, the question of a meeting of the minds as to "double-rigging" is within the province of arbitration.

In addition, the parties herein have voluntarily submitted their dispute to arbitration, thus evincing a subsequent agreement for private settlement which would cure any defect in the arbitration clause. Since Clause 17 of the charter parties is referred to in the submission, the arbitrators would thereby be invested, through incorporation by reference, with the same breadth of authority as under the clause itself. This possibility was recognized in the *Finsilver* case, *supra*, 253 N. Y. 382, 391, 171 N. E. 579, 582, where Chief Judge Cardozo stated: "We assume that circumstances may exist in which a party to an arbitration, joining in its proceedings without protest or disclaimer, may be found to have joined by implication in the appointment of the arbitrators, and to have confirmed their jurisdiction, if otherwise defective."

The court below held that respondent had waived any right to rescission by failure to object to the rigging actually furnished until May 10, 1957, over four months after delivery of the first vessel. *Grymes v. Sanders*, 93 U. S. 55, was cited in support of this decision. Respondent asserts that it complained promptly after actual discovery of the defect, and cites *Pence* v. *Langdon*, 99 U. S. 578. While this issue is not free from doubt, it is rendered moot by the position we adopt.

Order affirmed.

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JAMES R. BROWNING, Clerk

Supreme Court of the United States

OCTOBER TERM, 1959.

No. 938

CHILEAN NITRATE AND IODINE SALES CORPORATION,

Petitioner,

against

AMICIZIA SOCIETA NAVEGAZIONE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR RESPONDENT AMICIZIA SOCIETA NAVEGAZIONE, IN OPPOSITION.

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Opinions.

The opinion of the District Court for the Southern District of New York is unofficially reported at 1960 American Maritime Cases 624 and is also contained on pages 50a to 54a of the Petitioner's brief in the Court of Appeals.*

The unanimous opinion of the Court of Appeals (Clark, C. J.) is reported at 274 F. 2nd 805.

* As in the Petition, citations to the Appendix of Petitioner's Court of Appeals brief are to numbers suffixed with the letter "a." Citations to the record in the District Court are to numbers prefixed with the letter "R."

Jurisdiction.

The judgment of the Court of Appeals was entered on January 16, 1960. Petition for Writ of Certiorari was filed on May 14, 1960. The jurisdiction of this Court is invoked under 28 U. S. C. §1254 (1).

Question Presented for Review.

Simply stated, the question is

Whether a party (a) who demands an arbitration pursuant to an arbitration clause in a Charter Party under which the parties were performing and (b) who elects to claim for damages for breach of a Charter Party and (c) who participates in the arbitration, may subsequently claim that the said Charters are void for a want of the meeting of the minds of the parties on the very issue submitted to the arbitrators.

Statement.

In September, 1956, two vessels, then under construction, namely the *Giorgio Parodi* and the SS *Donatella Parodi*, were chartered for five years by the Petitioner (here called Charterers) from the Respondent (here called Owner) (7a). The Charter Parties contained an arbitration provision that "any" dispute between the parties should be referred to three arbitrators in New York. The decision of any two arbitrators to be "final" (11a).

In December, 1956, after a complete inspection and survey by the Charterers, the first of the two vessels, the SS *Giorgio Parodi*, was delivered to the Charterers (48a). Six months later, after continuous use by the Charterers, a belated protest as to the rigging at the hatches was made (17a).

Notwithstanding knowledge of this alleged defect, the Charterers in August, 1957, accepted delivery of the second vessel, the SS. *Donatella Parodi*, without protest or exception (17a). Both vessels were then and are now in Charterers' service. Not until March of 1958 did the Charterers demand arbitration, alleging that the Charter Party requirement of double rigged meant each hatch must have four booms and four winches. Owners maintained that the vessel with two winches and two booms fulfilled the requirement of the Charter Party (14a).

Arbitration was demanded by the Charterers and their attorney drew up the submission agreement wherein it was stated:

> "1. Under the subject Charter Party, does hatch equipment, consisting of two winches and two booms, satisfy the Charter Party term that the hatch be 'double-rigged?' "
>
> "2. If the answer to Question No. 1 is in the negative, what damages, if any, is Charterer entitled to under the facts concerning the delivery and operation of the vessel under the subject Charter Party?" (7a, 14a).

At no time was it ever suggested to the arbitrators nor to any Court that the contracts were void.

After many hearings, the arbitrators found in Owners' favor on the submitted issue No. 1 and, therefore, there was no need to consider issue No. 2 (15a-18a).

The Decision in the District Court.

The Owners moved in the District Court for an order confirming the arbitration award which motion came on for hearing on April 23, 1960. Immediately before the motion was to be heard, the attorneys for the Charterers

served the attorneys for the Owners with a Notice of Motion dated the same date seeking to vacate the award for a mistake of law (5a). In a supporting affidavit, Charterers also moved in the alternative that the Charters be declared void for failure of the parties' minds to meet.*

This was the first time the Charterers raised the latter point. Quite apart from the fact that the point had not been timely raised, Owners' counsel made no comment on this theory because it was felt that it did not require a response since the sole authority upon which it was based had been overruled by legislative enactment.

The District Court found no support in the law for vacating the award for a mistake of law. The meeting of the minds theory was firmly rejected on the ground that, after a contract has been performed or executed, it cannot be claimed there was no contract (50a-54a).

The Decision of the Court of Appeals.

The Court of Appeals unanimously affirmed the District Court order noting that the theory which the Charterers labelled a mistake of law was a question of fact. In any event, if there was a misapplication of law (which the Court doubted), the same did not rise to the stature of a manifest disregard of the law.

The Court struck down the alternative argument as to meeting of the minds on the grounds that:

> 1. there was no contention as to the failure of the meeting of the minds in respect to the Arbitration Clause. Therefore, since the Clause was separate and

* Parenthetically, it may be noted that the Clerk of the Court at first refused to accept the cross-motion since it was not timely filed pursuant to Rule 9b of the Rules of the District Court. However, the District Judge permitted the filing.

provides for unrestricted submission (any dispute), the issue as to the meeting of the minds regarding "double-rigged" was for the arbitrators.

2. Even if there were a defect in the Arbitration Clause (which Charterers have never contended), the defect would have been cured by the voluntary submission to and the participation in the arbitration.

Argument.

This petition represents the final grasp at the proverbial straw by the Charterers and constitutes the fourth attempt to seek a favorable determination of a matter which they had previously agreed was to be finally settled with the arbitrators' decision. The various arguments of the Charterers have been successively rejected by (1) the majority of the arbitrators, (2) the District Court and (3) a unanimous Court of Appeals.

Charterers now come to this Court with their belated argument that since both parties may have had a different concept as to double rigging, there was no meeting of the minds, and, consequently, the Charter Parties are void. But it was precisely this clash as to meaning which precipitated the arbitration proceedings.

Needless to say, after every judicial or semi-judicial proceeding a disgruntled party will urge that there was no meeting of the minds as indicated by the decision of either a court or arbitrators. But if this were so, all arbitration proceedings would be worthless.

Notwithstanding the fact that the vessels have been and still are in Charterers' service and despite the fact that the Charterers demanded arbitration seeking only money damages (not that the contracts be voided) alleging disagreement as to the meaning of a single term, Charterers now

argue the very issue submitted to the arbitrators constitutes the basis for a declaration by this Court that the contracts are void.

In support of this proposition, Charterers cite *Kulukundis Shipping Co.* v. *Amtorg Trading Corp.*, 2 Cir. 126 Fed. 978, and *Finsilver Still & Moss* v. *Goldberg Mass & Co.*, 253 N. Y. 382, 171 N. E. 579.

There is nothing in the facts of the *Kulukundis* case which remotely resembles those now before the Court. Furthermore, Charterers' alleged prior reliance on it is to be seriously doubted since it was not cited in either their brief in the District Court nor in their main brief to the Court of Appeals.

In the *Finsilver* case, it was held that one who stays out of arbitration proceedings and maintains his position as to the non-existence of the contract can raise an issue as to the non-existence of the contract on a motion to confirm an arbitration award. Again, there is no resemblance on the facts of that case to this matter since there was no participation in the arbitration proceeding by the party claiming no contract.

Charterers faintly suggest that had this matter been determined according to the law of New York, a different result might have been reached.

This reasoning is difficult to understand in view of the amendments to the New York Arbitration Act enacted in 1937 (seven years after *Finsilver*). The law in New York now specifically precludes one who participates in the arbitration proceedings from raising an issue as to the validity of the contract (New York Civil Practice Act Section 1458).

This legislation limits a party who desires to litigate the issue as to the validity of a contract to a motion before arbitration and if he does not do this his participation in the arbitration proceeding is to be deemed a waiver.

In fact, since the *Finsilver* case (*supra*), the New York Courts have specifically pointed out that *Finsilver* is no longer the law and that under present law, participation in either the selection of the arbitrator or in any of the arbitration proceedings estops the raising of the jurisdictional issue as to the making of the contract providing for arbitration. Consequently, a party maintaining such jurisdictional issue can only do so by moving to stay the arbitration and having such issue disposed of *first* by the Courts.*

Here, Charterers were well aware, as witness the arbitration agreement, that each side held a difference of opinion as to a phrase in the Charter. If they were serious in their contention that the Charters were void, they should have moved the Court before arbitration. The very same Charterers who now assert there was no meeting of the minds did, however, initiate the arbitration proceedings and elected to claim damages (not that the contracts were void).

The statements in the Petition that the Owners acquiesced in the Charterers' request that the Courts determine the validity of the contract is sheer nonsense. Owners did not cover the point in the District Court because it was not raised until the very day of the motion. Similarly, Owners did not consider it worthy of reply since it was premised upon a case which had been overruled.

In a final attempt to prolong this seemingly interminable litigation, Charterers suggest that this case be set for hearing with the case of *Robert Lawrence Co.* v. *Devonshire Fabrics, Inc.*, 2 Cir. 1959, 271 F. 2d 402, cert. granted 80 Sup. Ct. 682 (1960) (No. 659). This last-ditch attempt to hang on to the *Lawrence* case should not be countenanced.

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* *Harris* v. *East India Trading Co.*, 16 Misc. 2d 87, 144 N. Y. Supp. 2d 894.

None of the reasons which were present in the *Lawrence* case exist here. Even if this Court were to reverse *Lawrence in toto*, the Charterers' theory would still be indefensible.

Little comment need be made as to Charterers' theory of a manifest disregard of law. The Charterers contend that the arbitrators committed a mistake of law in not applying the legal principle that a contract is to be enforced according to the meaning given to it by one of the parties when the other party knew or should have known the first party's meaning. Thus, Charterers argue Owners knew or should have known Charterers' meaning of double rigged. As was pointed out by the Court of Appeals in their decision, there was no finding by the arbitrators that Owners knew or should have known Charterers' meaning. The decision is clear that Charterers never communicated their meaning to the Owners. This mistake in Charterers' theory was pointed out by the Court of Appeals which also stated that even if it be assumed that this were a mistake of law, it does not rise to the rank of a manifest disregard of the law. The Owners believe that the cases cited by the Court of Appeals are sufficient authority that arbitration awards are not vacated for mistakes of law.

Charterers charge that the Courts are unduly lenient in affirming arbitration awards and should reverse arbitral findings with which they are not in accord. Suffice it to say, that such functions should be reserved for appropriate action by the Congress. The Arbitration Act clearly sets forth the grounds for vacating an arbitration award, 9 U. S. C. 10, 11.

This is a simple, routine matter not involving any principles affecting new or novel, undetermined issues of law. There is no clash of authority nor any constitutional issue involved. In short, there is not cited one single factor which would justify review.

Conclusion.

For the foregoing reasons, it is respectfully submitted that the writ of certiorari be denied.

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